U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: NOV 14 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) subsequently dismissed the appeal, and dismissed the petitioner's motion to reopen and reconsider. The petitioner has filed a second motion to reopen and motion to reconsider. The motions will be dismissed, the previous decisions of the director and the AAO will be affirmed, and the petition will remain denied.

The petitioner is a physicians network firm. It seeks to employ the beneficiary permanently in the United States as a clinical director.[1] As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On January 5, 2010, the director denied the petition. Following an examination of the petitioner's financial information submitted, including its 2008 and 2009 corporate tax returns, the beneficiary's compensation paid by the petitioner in 2008 and 2009, the petitioner's unaudited financial statements, and counsel's assertions that the petitioner's net current assets and net income should be considered in combination, the director found that neither the petitioner's net income nor net current assets could cover the difference between the actual wages paid to the beneficiary and the full $124,800 proffered wage in either 2008 or 2009.

The petitioner filed an appeal. On Part 2 of the Form I-290B, Notice of Appeal or Motion, the petitioner checked "B," indicating that a brief and/or additional evidence would be submitted to the AAO within 30 days. On April 27, 2012, the AAO summarily dismissed the appeal, noting that no further documentation had been received to its office and that 8 C.F.R. §§ 103.3(a)(2)(vii) and (viii) require that any brief should be submitted directly to the AAO.

The petitioner filed a motion to reopen and a motion to reconsider the AAO's April 27, 2012, decision, asserting that the brief had been sent to the Nebraska Service Center in an attempt to connect it with the file. On December 27, 2012, the AAO dismissed the petitioner's motions. The AAO found that the petitioner, not the Service, was responsible for the petitioner's error in sending its brief to the wrong location. It noted that the regulation and the instructions for the Form I-290B provided that a brief and/or additional evidence could be submitted with the Form I-290B or could be sent directly to the AAO within 30 days of filing the appeal and that the AAO's address was provided in the instructions. The AAO additionally found that the petitioner had not presented a basis for its filing to be considered a motion to reopen. The AAO further determined that the petitioner's filing could not be approved as a motion to reconsider because it was not Service error

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[1]The record reflects that the petitioner has filed two other Immigrant Petitions for Alien Worker (Form I-140s) on behalf of the beneficiary. [redacted] was filed seeking to classify the beneficiary as an outstanding researcher. The director denied it on January 4, 2010. [redacted] was filed seeking to classify the beneficiary as a second preference, advanced degree professional, as in the instant case. It was denied on July 8, 2013 and a subsequent motion to reopen and reconsider was dismissed on August 30, 2013.

which caused the misfiling and that reasons for reconsideration were not supported by any pertinent precedent decisions that established that the AAO's April 27, 2012, dismissal was based on an incorrect application of law or [USCIS] policy.

Through counsel, the petitioner submitted another motion to reopen and a motion to reconsider the AAO's December 27, 2012, decision. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

In this filing, counsel states that the AAO erred in not considering the "totality of circumstances" in adjudicating the issue of the petitioner's ability to pay the proffered wage. Counsel submits copies of three older cases[2] relating to the petitioner's ability to pay where the appeal was sustained. Counsel's brief reiterates the argument made in the first motion relevant to the reason that the appellate brief was not sent to the AAO. The remainder of the brief addresses the petitioner's ability to pay the proffered wage.

Counsel's motion is only relevant to the AAO's December 27, 2012 decision in that it again addresses the reason that it failed to follow the regulation, the instructions to Form I-290B, and its own designation on the Form I-290B that a brief and/or additional evidence should be sent directly to the AAO if it was not being submitted with the Form I-290B. As these instructions are clear, the AAO again concludes that as it was not Service error responsible for the materials being sent to the wrong location, the AAO's dismissal of the appeal was entirely proper. Neither the AAO's decision of April 27, 2012 summarily dismissing the appeal, nor its decision of December 27, 2012 upholding this dismissal was incorrect. Counsel's instant motion does not establish that the AAO's decision was based on an incorrect application of law or [USCIS] policy. The three precedent decisions provided with this motion are not relevant and do not discuss facts based on a petitioner's error in failing to follow appellate procedure. Therefore, the motion filed herein does not qualify as a motion to reconsider. Nor does it qualify as a motion to reopen, as counsel has not presented any new evidence consisting of affidavits or other documentary evidence, which would show that Service error was the reason that the petitioner failed to follow appellate procedure.[3]

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[2]Only one case involves an appeal, which was sustained based on a review of the "totality of circumstances." Further, it is not a precedent decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

[3] Even if the AAO were reviewing the overall circumstances affecting the petitioner's ability to pay the proffered wage of $124,800 from the priority date of December 2, 2008 onward, which it is not, the petitioner's assertions on motion would not warrant such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967). The *Sonegawa* case related to petitions filed during

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motions, the movant has not met that burden. Based on the foregoing, the petitioner's motions do not qualify as a motion to reopen or a motion to reconsider and will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

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uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Here, the petitioner has not shown the ability to pay the proffered wage in either of the two tax returns submitted to the record. As noted by the director, USCIS will consider separately, but not in combination, the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. Counsel's method would duplicate revenues received by the business. The petitioner's 2008 tax return showed that neither its net income of $3,885 nor its net current assets (lines 1 through 6 of Schedule L of the tax return minus lines 16 through 18) of $31,606 could cover the $122,800 difference between the beneficiary's compensation of $2000 paid in that year by the petitioner and the proffered wage of $124,800. Similarly, in 2009, neither the petitioner's net income of $75,934 nor its net current assets of $53,852 could cover the $98,401.27 deficiency when comparing the beneficiary's actual compensation of $26,398.73 paid that year and the full proffered wage of $124,800. Moreover, in 2008, the proffered wage represented 96 percent of the total salaries and wages paid by the petitioner and exceeded the petitioner's net income by $120,915. In 2009, the proffered wage represented 78 percent of the total salaries and wages paid and exceeded the petitioner's net income by $48,866. No unique or other unusual factors analogous to those which prevailed in *Sonegawa* have been presented by the petitioner or are evident from the record. Thus, the petition does not merit approval pursuant to *Matter of Sonegawa.*

ORDER: The motion to reopen and motion to reconsider is dismissed. The director's decision of January 5, 2012, and the AAO's decisions of April 27, 2012 and December 27, 2012 are affirmed.